



HARTY *Conflict Consulting & Mediation*

ASSESSMENT REPORT
ON
PROSPECTS FOR MEDIATED NEGOTIATION OF A
LAKE MANAGEMENT PLAN FOR LAKE COEUR D'ALENE



PREPARED FOR:

U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT
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CENTER

Prepared by: J. Michael Harty
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Executive Summary

This report is the product of an assessment of the potential for using mediation to support successful negotiation of an updated Lake Management Plan ("LMP") for Coeur d'Alene Lake [the "Assessment"]. It is based on confidential interviews with over 40 people who live or work (or both) in the Coeur d'Alene Basin, as well as feedback from two report-back sessions in Coeur d'Alene in June 2006.

The Lake has received as much as 83 million tons of sediments containing zinc, lead, and other dissolved metals since mining began upstream in the Silver Valley. A portion of this sediment has been transported across Post Falls Dam and down the Spokane River into Washington State. The remainder is distributed around the bottom of the Lake.

U.S. EPA initiated a CERCLA action upstream, at the Bunker Hill Mining and Metallurgical Complex NPL site, in 1998. There has been consistent local conflict and criticism associated with this cleanup effort. EPA issued an interim Record of Decision (ROD) for Operable Unit 3 in 2002 that does not include the Lake. The ROD assumed successful negotiation of a revised LMP as a way to address potential issues related to metals in lake sediments. The State and EPA have communicated to the public that the Lake is "drinkable, fishable, and swimmable" since 2002. Some experts have expressed public concerns about potential geochemical processes linked to nutrient levels in the Lake. At this time, however, there is no evidence of stigma to property around the lake associated with the CERCLA cleanup or presence of metals in lake sediments.

There is broad agreement across the Coeur d'Alene Basin that the quality of Lake Coeur d'Alene's water must be protected, and that the multi-faceted value of the Lake to the region's people must be preserved. Protecting the Lake's water quality by ensuring that metals in lake sediments are not mobilized is essential for the Basin's economy, and will require broad education and support from governments and individual citizens.

There have been several versions of a LMP since the first was negotiated in 1996. Funding has been a significant barrier to implementation, as has the largely voluntary nature of management actions. The Tribe and State have cooperated on some aspects of lake management but were unable to reach agreement on an updated LMP in 2004. A Supreme Court ruling in 2001 confirmed federal (as trustee) and tribal jurisdiction over the bed and banks of the lower third of the Lake. This ruling had significant consequences that are still being felt around the Basin and have contributed to the need for a revised LMP.

This report presents answers to the following key questions:

1. *What are the sources of impasse in past LMP negotiations, and can they be avoided in the future?*
2. *Are there ways to design the next LMP negotiation to avoid past sticking points?*
3. *How can other stakeholders be effectively engaged in negotiation of a revised LMP?*
4. *What are the likely consequences of failing to reach agreement in the current effort?*

Based on these questions, the report contains recommendations for an overall LMP negotiation framework, as well as a recommended model for structuring representation. The overall framework incorporates (1) an adaptive approach, (2) a scope that is narrow but has the potential to expand, (3) an emphasis on maximizing the benefits of voluntary action under existing regulations, and (4) a marketed approach to LMP development. The recommended structure for representation balances multiple criteria for success and differs from past and present structures in order to maximize prospects for a sustainable agreement. The State, Tribe, and EPA, as jurisdictional stakeholders, are the primary negotiators under this model. There is a requirement for direct dialog with other stakeholders, such as local governments, the State of Washington, environmental advocates, and the business community, based on specific LMP issues and respect for jurisdiction. There also is a requirement for consistent reporting back to other stakeholders to promote transparency and understanding. Broader engagement of the public is also recommended, at an appropriate time, in order to build ownership and support implementation. The report presents two other representation structures that reflect different balancing of criteria, but these are less likely to promote successful LMP negotiations.

Stakeholders and citizens in the Coeur d'Alene Basin have an opportunity to forge a new vision of respectful collaboration through negotiation and implementation of a revised LMP. This vision could reflect and respect shared jurisdiction of the Lake by the Coeur d'Alene Tribe and State of Idaho. It could integrate the Basin's complex terrestrial jurisdictions and authorities in order to maximize the potential for a successful voluntary system of lake management. The vision could reflect acceptance of change and respect for valued traditions. As noted above, citizens in the Basin agree broadly on the importance of protecting the Lake. This shared agreement is an important part of the foundation needed to support LMP negotiations and implementation. The foundation also requires an overall approach and representation structure for LMP negotiations. The potential for achieving a positive vision will depend on the choices of leaders at all levels of government about LMP negotiations.

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I. Introduction

This report is the product of an assessment of the potential for using mediation to support successful negotiation of a revised Lake Management Plan for Coeur d'Alene Lake [the "Assessment"]. Harty Conflict Consulting & Mediation ["HCCM"] conducted the Assessment as Phase I of a two-phase contract with the U.S. Institute for Environmental Conflict Resolution [the "Institute"]. The purpose of the Phase I Assessment is to "better understand sources of impasse in past negotiations, develop design approaches that will reduce potential sticking points in present negotiations, and provide recommendations for ways to engage other stakeholders in Phase II." This report has been prepared pursuant to Task 6 under the Scope of Work, and is intended for distribution to all participants in the Phase I Assessment. The Institute and U.S. EPA's Conflict Prevention and Resolution Center reviewed a draft of this report pursuant to the contract and provided input to HCCM. Final choices regarding content are the responsibility of HCCM.

The report is based on: direct communication with at least 49 people, in the form of brief requests for advice, extended confidential interviews, or follow up discussions; review of documents and publications; and research using online sources such as the web pages for the Coeur d'Alene Tribe and Basin Environmental Improvement Project Commission ["BEIPC"]. The names of people participating in the Assessment can be found at Attachment A. The Assessment process included two report-back sessions to participants on June 26, 2006, in Coeur d'Alene. This report incorporates feedback from those sessions as well. The willingness of participants to share their views was essential to this Assessment and is greatly appreciated.

Stakeholders and citizens in the Coeur d'Alene Basin have an opportunity to forge a new vision of respectful collaboration through negotiation and implementation of a revised LMP. This vision could reflect and respect shared jurisdiction of the Lake by the Coeur d'Alene Tribe and State of Idaho. It could integrate the Basin's complex terrestrial jurisdictions and authorities in order to maximize the potential for a successful voluntary system of lake management. The vision could reflect acceptance of change and respect for valued traditions. There is broad agreement across the Coeur d'Alene Basin that the quality of Lake Coeur d'Alene's water must be protected, and that the multi-faceted value of the Lake to the region's people must be preserved. This shared agreement is an important part of the foundation needed to support LMP negotiations and implementation. The foundation also requires an overall approach and representation structure for LMP negotiations. The potential for achieving a positive vision will depend on the choices of leaders at all levels of government about LMP negotiations. This report frames some of those choices for structuring negotiations, and offers a set of recommendations.

Finally, a note about the report's approach to water quality in the Lake. This report focuses primarily on prospects for negotiating a LMP. The report is not a technical water quality document and discusses water quality in the Lake only as it relates to negotiation of a LMP. *There is no new water quality information in the report.* Only water quality information already presented and discussed in public forums such as the Basin Environmental Improvement Project Commission contributes to the report's observations, conclusions and recommendations.

II. Background

The Coeur d'Alene River has carried significant quantities of sediments containing lead, zinc, and other dissolved metals into the Lake since mining began in the Silver Valley in the late 19th century—perhaps as much as 83 million tons. A portion of this sediment has been transported across Post Falls Dam on the Lake's northern end and down the Spokane River into Washington State. The balance of the sediment is distributed around the Lake. According to the National Research Council,

[t]he geochemistry of the lake bottom is of concern because the processes occurring there determine the extent to which the metals in the contaminated sediments will become biologically available and thus a risk to the fish and benthic populations. If the metals remain in the insoluble form, these risks are reduced. *Maintaining a lake environment that will keep these metals insoluble is a primary goal of a lake management plan . . .*¹

The State of Idaho and Coeur d'Alene Tribe (and other entities including the Clean Lakes Coordinating Council) agreed on a Lake Management Plan in 1995-6 (the 1996 LMP). The 1996 LMP relied extensively on voluntary management actions to achieve its goals and lacked secure funding commitments to support implementation. According to comments in the *Spokesman-Review* in 2001, the 1996 LMP "gather[ed] dust on shelves all over Kootenai County for half a decade . . . [I]t has been ignored since it was completed. No oversight board exists to monitor the plan and coordinate tasks among agencies. Little funding ever was earmarked specifically to meet the plan's goals."² The assessment interviews yielded similar perspectives, including a suggestion that the 1996 LMP lacked programmatic support, as well as acknowledgment of many sound elements.

In 1998, EPA initiated a Remedial Investigation and Feasibility Study for Operable Unit Three ("OU3") of the Bunker Hill Mining and Metallurgical Complex NPL site that covered some 1,500 square miles, including the Lake. Subsequent environmental cleanup in the Basin has been characterized by a high level of local opposition and distrust of EPA, and was a theme in assessment interviews.³ The NRC Report noted that "substantial controversy surrounds remediation at the Coeur d'Alene River basin site . . . cleanup efforts were strongly opposed both locally and within the Idaho state government, partially stimulated by fear of the economic consequences of having the entire basin declared a Superfund site."⁴

¹ *Superfund and Mining Megasites, Lessons From the Coeur d'Alene River Basin*, prepared by the Committee on Superfund Site Assessment and Remediation in the Coeur d'Alene River Basin, National Research Council, p. 90 (2005). The report will be cited as "NRC Report."

² *Spokesman-Review*, July 9, 2001, from an article by Julia Silverman.

³ This report makes no judgments about these responses in connection with individual cleanup decisions and actions or overall approach.

⁴ NRC Report p. 4. See also p. 17 (Opposition was particularly strong in connection with the designation of OU3, based partly on fears of stigma from a Superfund designation and corresponding harmful economic impacts.).

In April 2001 the State of Idaho created the Basin Environmental Improvement Project Commission ("BEIPC") by statute.⁵ The BEIPC became operational in August 2002 following execution of a Memorandum of Agreement (BEIPC MOA) among governments on the Board of Commissioners. The roles of the Commission are to "exercise certain state authorities to address heavy metal contamination in the Coeur d'Alene Basin, as set forth in the enabling legislation; and to coordinate the Commission's activities and authorities with other entities operating in the Basin to achieve a similar purpose."⁶ The BEIPC MOA also provides that the Commission "may address . . . [a]doption and implementation/coordination of the Lake Coeur d'Alene Management Plan to manage, enhance, preserve, and protect lake water quality"⁷

In June 2001 the U.S. Supreme Court issued its opinion in *Idaho v. United States*, No. 00-189. The 5-4 majority ruled that the United States holds title to lands underlying portions of the Lake and the St. Joe River within the external boundaries of the Coeur d'Alene Tribe's reservation in trust for the use and benefit of the Tribe. The affected area encompasses approximately the lower third of the Lake.

In August 2002 former EPA Administrator Christine Todd Whitman visited Coeur d'Alene and held a series of meetings around the Basin. During her visit the Administrator declared the Lake to be "drinkable, fishable, and swimmable," and symbolically sipped from a glass of Lake water.⁸

A month later, in September 2002, EPA issued an Interim Record of Decision for OU3, including a Selected Remedy. Lake Coeur d'Alene is not part of the Selected Remedy. According to the ROD, EPA concluded that active remediation of lakebed sediments was not warranted based on current information, and that a lake management plan created outside CERCLA, using "separate regulatory authorities," would be sufficient.⁹ The State's letter of concurrence stated its opposition to

⁵ Idaho Statutes Title 39-8101 *et seq.*

⁶ *Memorandum of Agreement for the Basin Environmental Improvement Project Commission*, August 13, 2002, p. 1. The BEIPC Board is comprised of representatives from the State of Idaho, the Tribe, the United States (EPA), the Counties of Shoshone, Kootenai, and Benewah, and the State of Washington.

⁷ The Commission's Board acts by majority vote, subject to veto by the Tribe, the United States, or Idaho, or the three counties voting together (Washington does not have veto power). Interpretation of the MOU is based on consensus, and it is up to the MOU signatories to resolve any disputes. According to the 2005 Report, the BEIPC "is involved in Coeur d'Alene Lake management planning and implementation," in part through funding of a joint project between IDEQ and the Tribe to audit measures taken to fulfill management actions recommended in the 1996 LMP. An Ombudsman Report issued by EPA's Office of Inspector General in 2004 recommended clarification by the Commission of its "exact status, especially including a consensus among all Basin Commission members" to ensure there is a settled definition of the Commission's powers and abilities. See "Ombudsman Review of Bunker Hill and Coeur d'Alene Basin Superfund Actions," Report No. 2004-P-00009, March 24, 2004, p. 9 (*Ombudsman Review*).

⁸ See, e.g., a *Spokesman-Review* story dated Wednesday, August 14, 2002, including photo.

<http://www.spokesmanreview.com/news-story.asp?date=081402&ID=s1199474>.

⁹ The ROD states that "[s]tate, tribal, federal, and local governments are *currently in the process of implementing a lake management plan* [the 1996 plan] outside of the Superfund process using separate regulatory authorities The lake management plan would focus on reducing riverine inputs of metals and nutrients that continue to contribute to contamination of the lake and the Spokane River." The ROD describes a planned joint monitoring program for the lake, and addresses the possibility of future actions: "If conditions change or new information that modifies the current understanding becomes available, additional actions will be evaluated. Evaluation of lake conditions will be included in

identifying the Lake as a Superfund site or part of a CERCLA site.¹⁰ EPA's approach effectively precluded the use of CERCLA funding for LMP implementation according to interviews.¹¹

The State and Tribe formed a Review Committee composed of two State appointees and two Tribal appointees in 2002 for the purpose of evaluating the 1996 LMP with a focus on "the current and long-term appropriateness, implementability and effectiveness of the Plan."¹² Using this framework, the State and Tribe collaborated extensively on a 2002 Addendum to the 1996 LMP that included detailed comments from a diverse set of agencies and organizations.

The Tribe and State tried, but failed, to reach agreement on an updated LMP in 2004.¹³ The State prepared its own 2004 LMP Update for the two-thirds of the Lake over which it has jurisdiction. According to that document, "DEQ and the Tribe could not agree on the level or degree of funding assurances for staffing and implementation projects prior to going forth with a published final *Coeur d'Alene Lake Management Plan Update 2004*."

the five-year review process." The Second Five-Year Review for the Bunker Hill Site issued in October 2005 changes the language: "[s]tate, tribal, federal, and local governments are *in the process of developing a revised lake management plan* outside of the Superfund process using separate regulatory authorities." P. ES-8.

¹⁰ *Letter of Concurrence from Gov. Kempthorne*, p. 4. There was substantial, but not unanimous, support at the time of the 2002 ROD for a partial "delisting" of the Lake from the NPL as quickly as possible. Completing a LMP was viewed as an essential step to delisting. Interviews suggest that after four years without evidence of stigma—the regional economy is booming—the urgency associated with delisting has diminished somewhat, although it remains a desired outcome for some. Opposition to delisting is based primarily on concerns about the importance of effective lake management, including adequate funding and regulatory authorities.

¹¹ See *Ombudsman Review* comments of EPA Region 10, p. 23 (describing likely lack of eligibility for CERCLA funding). The Tribe reportedly viewed this approach as creating an unfunded federal mandate. *Ombudsman Review* p. 12.

¹² *Memorandum of Agreement for Evaluation and Recommendations Regarding the Coeur d'Alene Lake Management Plan* (2002 MOA). This document also provides for "voluntary participation" on the Review Committee by other appropriate entities. The State executed a separate *Memorandum of Agreement for County Participation in the Evaluation and Update of the Coeur d'Alene Lake Management Plan* with Kootenai, Shoshone, and Benewah Counties providing for participation in meetings and activities of the Review Committee. Interviews suggest this arrangement may have influenced expectations among local government officials about the structure for future negotiations on a revised LMP.

¹³ The issues that could not be resolved at that time are a touchstone for this assessment, and have been discussed with both parties.

The DEQ 2004 Update identified the following problems with the 1996 LMP:

- *Many of the Management Actions outlined in the 1996 LMP have been implemented, but some have not, in many cases due to lack of funding.*
- *There is no dedicated source to adequately fund implementation of lake restoration and protection measures.*
- *There is no dedicated staffing to oversee and coordinate LMP implementation work.*
- *There is no long-term program to monitor lake water quality and adequately track water quality trends.¹⁴*

The Tribe completed its own draft Lake Management Plan in February 2006, at the time the Assessment was beginning.

Finally, 2006 was the final year of a three-year cooperative Tribe and U.S. Geological Survey water quality sampling project. The project's objectives are to: (1) assess current lake water quality conditions and trends with respect to potential mobilization of mining-associated metals contaminants from lakebed sediments, (2) identify potential changes in those conditions compared to those reported by lake studies completed in the early 1990s, and (3) characterize potential effects of ongoing environmental remediation efforts upstream.

III. Key Questions

The scope of work for this project identifies the following key questions:

1. *What are the sources of impasse in past LMP negotiations, and can they be avoided in the future?*
2. *Are there ways to design the next LMP negotiation to avoid past sticking points?*
3. *How can other stakeholders be effectively engaged in negotiation of a revised LMP?*
4. *What are the likely consequences of failing to reach agreement in the current effort?*

Each of these questions is answered briefly below. Subsequent sections of the report address the questions in greater detail.

What are the sources of impasse in past LMP negotiations, and can they be avoided in the future? Negotiators were unable to satisfy key interests related to an updated LMP in 2003-2004. As noted in Section II, differences over funding were a significant source of impasse at that time. Interviews suggested that additional factors contributed to impasse and it is uncertain whether simply addressing funding concerns would have assured agreement at that time. The key interests for the current LMP effort revealed during assessment interviews are discussed in Section IV of this report. Several changes since 2004 appear to improve prospects for reaching agreement:

- There is different leadership, both in terms of policy and approach;

¹⁴ 2004 LMP Update, p. 4. The *Ombudsman Review* also cited issues associated with lack of funding and recommended that Region 10 work with the State and Tribe "to reach some form of consensus about the dedication (or assignment) of funds or funding sources to pay for the implementation of the Lake Management Plan."

- There have been steps to fund lake management including staffing;
- There has been more time to adjust to separate jurisdiction over and management of the Lake;
- There is additional water quality data;
- There are some sound working relationships; and
- There are indications of increased flexibility about solutions.

The assessment interviews suggested current IDEQ management and Tribal leadership are realistic about potential obstacles and are prepared to seek a robust agreement. Finding sufficient common ground about funding appears to present the greatest challenge, followed by effective coordination of management actions and local dynamics. The potential influence of political dynamics at the federal, state, and local levels is a significant unknown, and could be supportive of an agreement or not.¹⁵

Are there ways to design the next LMP negotiation to avoid past sticking points? Design options can assist in minimizing the potential for renewing past conflicts. For example, negotiations can be structured to promote respect for jurisdictional authority, high-level agency engagement and appropriate inclusion of stakeholders¹⁶ and the broader public. A phased negotiation process that anticipates the need to “market” a draft LMP agreement to build support for funding may also be useful. Decision making, and the role of stakeholder and public input, can be structured to reflect varying levels of political and scientific complexity.¹⁷ However, design solutions alone cannot provide funding to implement a revised LMP or control political and policy choices.

How can stakeholders other than the Tribe, the State, and EPA be effectively engaged in negotiation of a revised LMP? The assessment interviews revealed a complex set of values, interests, and expectations linked to representation and inclusion in development of a revised LMP. There are different perspectives and priorities among local elected officials, the business community, property owners, the State of Washington, and individuals who have immersed themselves in issues related to lake conditions. These differences lead to the following question: *What are the lessons from past or existing processes and organizations—such as the 2002 LMP update or the BEIPC—that can inform the overall structure of a process for LMP negotiation and implementation?* This was a

¹⁵ Sources of impasse can be explored at multiple levels. This report focuses on more obvious sources of past impasse as well as differences in the present situation that suggest impasse can be avoided. The June 26th presentations explored sources of conflict at a deeper level, using the categories that comprise the Wheel of Conflict tool. History, values, structure, communication, and emotions, as well as needs and interests, have all contributed to past conflicts, and undoubtedly will influence future decision making. Impasse is not an inevitable result, however, particularly when causes are understood.

¹⁶ This report uses the terms *stakeholder*, *party*, and *negotiator*. There is a significant distinction between stakeholders with jurisdictional authority over the Lake (the Tribe, the United States as trustee, and the State of Idaho) and other stakeholders who may have terrestrial jurisdiction, downstream jurisdiction, or no jurisdiction. The report’s distinction between *jurisdictional* and *other* stakeholders is not a judgment about the importance of any stakeholder’s particular concerns related to lake management. The terms *party* and *negotiator* are used generally and do not refer to a particular stakeholder.

¹⁷ This question was covered in a slide entitled “Appropriate Decision Making Structures” at the June 26 report-back session.

particular focus for assessment interviews, and the answers shaped the recommendation in Section VII. Flexibility about how to address diverse interests related to representation and inclusion will improve prospects for effective LMP negotiations and positive outcomes across the Basin. By contrast, merely replicating or importing prior consultation and decision models (or insisting on the principles that underlie them) would likely re-stimulate prior conflicts and reduce prospects for a revised LMP.

What are the likely consequences of failing to reach agreement on a revised LMP in this effort? This Assessment cannot reliably predict the full range of consequences in the event agreement is not reached on a revised LMP. This limitation reflects the nature of assessments as well as the complex dynamics of this situation. Interviews and Basin history suggest a number of possibilities, depending on whether Lake trends are declining or are stable or improving. These possibilities are presented below in Tables 1A and 1B.

Table 1A

No Revised LMP Agreement-General
• Geochemical processes would continue.
• Some activities related to lake management likely would continue, perhaps in a coordinated way, perhaps not. The State and Tribe appear committed to water quality monitoring and could decide to work jointly on this activity. There may also be opportunities for joint research.
• There is significant potential for public disagreement over Lake conditions and trends at technical and policy levels.
• The results of the State-Tribe joint management audit would have uncertain value.
• OU3 ROD implementation would continue subject to funding.
• There is potential for efforts by one or more stakeholders to engage CERCLA or other authorities.
• Impacts from growth around the Lake would continue subject to jurisdictional responses.
• The Tribe likely would continue its current policy of pursuing full TAS status and implementing its water quality program.

Table 1B

No revised LMP Agreement: Declining Lake Trends	No revised LMP Agreement: Stable or Improving Lake Trends
<ul style="list-style-type: none"> • Potential increased attention and conflicting messages to the public about conditions, causes, responsibility, consequences, and options could lead to confusion and frustration 	<ul style="list-style-type: none"> • Pressure to reduce or limit state funding for Lake sampling and monitoring likely
<ul style="list-style-type: none"> • Significant pressure on all decision makers from constituents including property owners and businesses likely 	<ul style="list-style-type: none"> • Less attention in lower Basin to upper Basin actions that may impact the Lake's water quality
<ul style="list-style-type: none"> • Increased likelihood of action to engage CERCLA or other authorities and resources 	<ul style="list-style-type: none"> • State could seek partial delisting of northern portion of Lake: outcome would be uncertain at best
<ul style="list-style-type: none"> • Increased likelihood of a new statutory response 	<ul style="list-style-type: none"> • Long-term monitoring program likely with some coordination between Tribe and State
<ul style="list-style-type: none"> • Downstream governments, including the State of Washington and Spokane Tribe, could take a more active role in demanding attention to their concerns 	<ul style="list-style-type: none"> • Difficult choices potentially affecting Lake water quality postponed
<ul style="list-style-type: none"> • Prospects for delisting are significantly reduced 	

IV. Alignment of Issues and Interests for Structuring LMP Negotiations

The Assessment focused on learning as much as possible about the spectrum of needs related to LMP negotiations, paying particular attention to interests.¹⁸ The goal was to identify issues (related sets of interests) where interests appear to be mutually consistent and proposed solutions align, as well as issues where interests appear to be in tension or are uncertain and proposed solutions may conflict. The potential for reaching negotiated solutions is increased where interests are understood and appear to be mutually consistent and there is alignment of proposed solutions. Interests can be understood as *substantive* (lake conditions), *procedural* (the process for negotiating an LMP or setting standards), or *psychological* (whether needs for respect and acknowledgment are met). Organizations typically have interests, along with individuals. The following is a summary of key issues and interests without attribution, consistent with commitments to confidentiality for all interviews. Some of these interests relate to the structure of negotiations, while others relate more to the substance of a future revised LMP. This section concludes with a brief discussion of motivation to negotiate an LMP and exploration of additional issues that could influence outcomes.

Issues and Interests

Issue: Condition of the Lake. There is broad agreement among all stakeholders on a core interest, namely ensuring a high-quality lake environment. This shared interest is a significant factor supporting LMP negotiations.

¹⁸ This spectrum was described at the report-back sessions, covering survival needs, interests, and needs for community and self-identity.

Issue: Economic interests related to the Lake. The Lake is consistently acknowledged as the primary economic asset of the region. There is significant investment—approaching \$1 billion at the high end of estimates—in real property around the Lake, both for private residences and resort development, and related businesses. Setting aside its other significance, the Lake is deeply important to the Tribe’s economic interests as well. Tourism based on the Lake and related amenities are major economic contributors. Retail and service businesses rely heavily on tourism. Delisting of the Lake from the NPL generated local support in the past—although not from the Tribe—primarily as a solution that would limit the risk of harm to economic and other interests from “stigma.”¹⁹ The Assessment suggests this solution remains of interest to some stakeholders, although there is reduced urgency in light of the positive economy. Negotiation and implementation of a revised LMP must take into account a strong, broadly shared interest in protecting property and maximizing economic value.²⁰

Issue: Funding for LMP implementation. There is no disagreement on the importance of funding for a revised LMP, and there also is a shared recognition of the value in having a reliable and meaningful funding stream. There are different interests related to how much reliability can be achieved, and to funding amounts, timing, and sources. This set of issues has proved challenging in the past and will require significant attention, flexibility, and collaboration to achieve success in LMP negotiations.

Issue: What is a broadly acceptable set of goals or vision for a revised LMP, including implementation? This set of interests is about where to “set the bar” and is linked to funding. The interests disclosed during the assessment interviews reflect diverse values, history, and experience. In the past these interests have been translated into disparate visions. The path to a joint vision will likely traverse a challenging landscape of views about being “realistic,” not simply doing the least possible, and maximizing confidence that all important uses and values of the Lake are being protected.

Issue: Sovereignty and jurisdiction. This is a complex set of interests linked to multiple layers of jurisdiction and sovereignty within the Basin and across state lines. These interests resonate for most stakeholders—local, state, tribal, and federal—and can lead to limited flexibility about solutions because of legal and value-based principles. The interests have significant procedural and psychological components: individual citizens and people in government translate them into specific expectations about roles in decision making, which are addressed under the next issue.

The 2001 Supreme Court decision profoundly altered the boundaries of sovereignty and jurisdiction, and the implications of this change are significant for LMP negotiations. As an example: for the Tribe, any LMP negotiation and implementation effort must be respectful of Tribal sovereignty and jurisdiction over the southern portion of the Lake, consistent with the 2001 Supreme Court decision. This interest encompasses the full range of Tribal authorities and jurisdiction, including lands and other waters within its reservation boundaries and the exercise of

¹⁹ Concerns about creating stigma are reflected in resistance to funding scientific research not clearly required to understand lake conditions or trends, or not generally accepted in the scientific community.

²⁰ Interviews also made clear that the Lake has significant value for many Basin residents apart from its contribution to the economy. There are religious, cultural, familial, personal, and historical values that this report cannot begin to estimate, but that influence overall attitudes toward the Lake.

Treatment as a State (“TAS”) authority under the Clean Water Act. These interests are direct expressions of core values, and are linked to tribal identity, self-determination, and survival. Interviews suggest lingering difficulty among some non-Indian stakeholders and members of the public in acknowledging these interests, while for others they are a relatively new but undeniably legitimate priority for LMP decision making. While there is greater acceptance of these interests today than in 2001, change has been difficult and likely will continue to present challenges.

As another example, local governments want assurance that their past accomplishments and strengths will be acknowledged (i.e., Kootenai County’s recent Site Disturbance Ordinance 374 dealing with sediment control), that their legal authorities will be respected, and that they will not simply be “told what to do” in decision making about lake management (or CERCLA cleanup-see below). Local elected officials face the challenge of responding to a range of constituent values and views on these issues, with some voters resisting tribal jurisdiction over the southern portion of the Lake and harboring suspicions about tribal intentions to expand that jurisdiction, and other voters promoting opportunities for an integrated economy and a positive, respectful set of working relationships.

Values related to sovereignty and jurisdiction (along with the next issue group encompassing representation, inclusiveness, control, and ownership) can become an incentive to insist on roles in decision making that other stakeholders see as fundamentally inconsistent with the limits of legal authority. This can become a deeply value-driven conversation, with symbolic aspects overwhelming all others. The challenge for leadership will be to focus on the details of a revised LMP, and not allow the broader context to dominate discussion and decision making.

Issue: Representation, inclusiveness, control, and ownership. Assessment interviews and feedback from the June 26 report-back sessions revealed clear points of agreement, as well as points of divergence, related to structuring representation in LMP negotiations. There appeared to be reasonable alignment of procedural interests about LMP negotiations among the *jurisdictional stakeholders*: the Tribe, the State, and EPA. There also was general support for the principle of *inclusion* for other stakeholders, as well as the broader public, based on specific authorities, interests, and goals. Interviews revealed different preferences about the form and timing of inclusion, e.g., direct participation in LMP negotiations is different from attending a public workshop to learn about and comment on a draft LMP. Some local assessment participants expressed distrust toward state and federal employees who might “represent” them in LMP negotiations and insisted that local governments must have “equal” representation with tribal, federal, and state governments, i.e., the jurisdictional stakeholders, in any LMP negotiations. An acceptable negotiation structure must address the lack of trust in its design, even if the solution is not equal representation. Governments and citizens downstream from the Lake, largely in the State of Washington, also have strong interests in negotiation procedures and structures that fully acknowledge downstream interests in lake management.

Ultimately, success in a largely voluntary regulatory system depends on joint “ownership” of a revised LMP by tribal, state, local, and federal governments, businesses, resource industries,

property owners, and citizens located around the Basin. One goal for an LMP negotiation structure is to promote this ownership over time.

Issue: Schedules, deadlines, and flexibility. The stakeholders for a LMP negotiation have extensive experience with one another in diverse settings. Based on this experience, there are diverse interests related to jointly negotiating and then honoring schedules and deadlines in order to support consistent progress and reduce the potential for misunderstanding and frustration. There are related interests in appropriate flexibility about schedules in order to respond to unexpected events.

Issue: Fulfilling official, moral and spiritual obligations. A successful revised LMP will embody not only official obligations, but also moral and spiritual ones based on beliefs and values about nature, ancestors, laws, and future generations. Interests linked to these values vary among stakeholders and should be explicitly addressed as part of negotiations.

Motivation²¹

The foregoing discussion should leave no doubt that negotiators will be challenged to resolve conflicting interests in order to achieve agreement on a revised LMP. This conclusion leads to a set of important questions:

- *What will motivate decision makers and other stakeholders to seek agreement when interests or other factors cause conflict?*
- *Are there sufficient mutual interests linked to finding agreement?*
- *Do the “no LMP” scenarios described in Section III actually satisfy key interests of one or more stakeholders, suggesting a lack of motivation?*

It is not possible for this report to finally answer these questions. Participants in the assessment interviews advised that there is motivation at this time, at least among the jurisdictional stakeholders, to commit resources to LMP negotiations, based on judgments about the potential for reaching agreement. Motivation will be affected by perceptions of progress toward an agreement. For this reason, it will be useful to negotiate specific mileposts and timelines that support explicit and joint evaluations of progress.

Other Factors

There are a number of other factors that have the potential to influence LMP negotiations and merit attention as choices are made. These are discussed below.

- *Uncertainty over lake conditions, chemistry, and mechanisms.* The 2002 ROD identified two alternatives for the Lake: (1) no action, and (2) institutional controls focused primarily on management of nutrients (phosphorous and nitrogen). According to the NRC Report, the focus on limiting input of nutrients “is based on *the hypothesis, as yet unproven at this site*, that eutrophication of the lake will

²¹ For readers familiar with the concept of a Best Alternative To a Negotiation Agreement, or BATNA, motivation is directly linked to individual BATNAs, which can change in response to negotiations and external dynamics.

increase the flux of metals from bottom sediments that eventually will reach the Spokane River.”²² Interviews revealed a range of views among technical experts about lake conditions and trends, chemistry, and mechanisms that appears to be narrowing. The USGS-Tribal sampling program is providing new data that should improve understanding and further reduce disagreement. LMP negotiations must find common technical ground in the face of continuing uncertainty.

- *Science, technical capability, and public understanding.* One important characteristic of the assessment was that asking the question, “What is the condition of the Lake?” yielded different answers. A related question, “What is needed to achieve basic agreement on the Lake’s condition?” also yielded different answers. Multiple factors appear to contribute to this lack of agreement. One is the 2002 public message from EPA and the State that the Lake is “drinkable, fishable, and swimmable,” which can seem inconsistent with the caution expressed by some technical experts involved in a three-year water quality monitoring program.²³ A second factor is the diversity of backgrounds and expertise that provide the context for many public discussions. Agency scientists with specialized expertise in water chemistry share their views, as do citizens with diverse educational backgrounds who have devoted nights, months, and even years to learning about CERCLA and water quality. The conversations also are enriched by those with deep personal knowledge based on growing up around the Lake. Building shared public understanding and agreement about the Lake’s condition in these circumstances, in order to build ownership of a revised LMP, is a significant challenge.

- *Perceptions about the Tribe’s goals, motives, and relationships with other governments.* Interviews revealed consistent uncertainty among non-Tribal members about the Coeur d’Alene Tribe’s goals and motivations. For some people this uncertainty was expressed as distrust, fear, or suspicion, such as a belief that the current Tribal government seeks to expand its jurisdiction over the Lake and Basin. For others, uncertainty was unthreatening, mainly complicating effective communication but not reflecting deep fears.²⁴ The quality and intensity of uncertainty appeared to vary around the Basin. The Tribe’s status as a separate government that reflects different values and differentiates between tribal members and others contributes to uncertainty. Perceptions about a recent change in tribal leadership, and leadership styles, appear to have magnified uncertainty for some outside the Tribe. Interviews also revealed a perception of conflict between the Tribe and non-Indians based on different histories, experiences, cultures, values, and interests. Once again, however, individual perceptions varied across a wide spectrum, and some non-Indian participants assert that conflict is not a significant factor in their relations with Tribal members. This is a complex and important topic, and it is not possible to fully explore its complexity in this report. Based on the interviews, however, it appears inevitable that uncertainty about the Tribe will influence some perceptions about an LMP. *The LMP process also is a potential opportunity to reduce uncertainty, build relationships, and improve communication.* These brief comments are not a criticism of the Tribe or of the views or values of any group or individual in the Basin.

²² NRC Report

²³ See, e.g., a *Spokesman-Review* story dated Wednesday, August 14, 2002, including photo. <http://www.spokesmanreview.com/news-story.asp?date=081402&ID=s1199474>.

²⁴ One familiar example directly related to lake management is the varied response of non-Indians to the Tribe’s assertion of jurisdiction over the lower third of the Lake following the 2001 Supreme Court decision.

- *Dynamics related to other issues.* LMP negotiations could be affected by issues that arise in other forums. One current topic is the treatment of the Tribe's fuel tax revenues. A second is the Avista relicensing. A third is the impending adjudication of water rights in Northern Idaho basins, including the Coeur d'Alene River, although this is more likely to affect long-term LMP implementation.²⁵ A commitment to maintain separation will improve prospects for reaching agreement.

- *Leadership.* Idaho's new Governor (former U.S. Representative) C.L. "Butch" Otter, was elected in November and will take office in January 2007, along with his leadership team. Elin D. Miller was appointed as the EPA Region X Administrator effective October 30, 2006. Miller replaces Michael Bogert, who took a position with Interior Secretary (and former Idaho Governor) Dirk Kempthorn in Washington, DC. There is a broad expectation that leadership dynamics will influence LMP negotiation and implementation, but no unified view emerged from interviews that would support a reliable prediction.

- *Sensitivity to property rights, taxation, and government intrusion.* During interviews, many non-Indians alluded to a dominant set of values in North Idaho related to protection of individual property rights, objection to taxation, and sensitivity to government intrusion. "We are different from Boise" was a common interview theme, as was "We are different from the State of Washington despite proximity." A number of people advised against proposing a regulatory body similar to the Tahoe Regional Planning Agency, which was created with the goal of protecting the quality of Lake Tahoe (located in Nevada and California) from development. The views of tribal leadership about these values were not addressed in the interviews. These values likely will influence non-Indian attitudes toward lake management institutions and funding.

- *Effectiveness of the Idaho Congressional delegation.* Interviews reveal a consistent perception that the Idaho Congressional delegation is highly effective and could play a positive role in supporting a revised LMP if there is broad stakeholder support, even with declining federal budgets.

V. Criteria for Success

This section of the report describes a set of criteria for design and execution of a successful LMP negotiation. They are derived in part from the key issues and interests described in Section IV, and in part from experience with similar negotiations. These criteria serve as reference points for multiple options and a recommendation about structuring a negotiation in Section VI. The criteria are presented in table format, without any priorities.

<i>Criteria</i>
<i>Reasonable Openness and Transparency:</i> Negotiators can reduce suspicion and build support by

²⁵ See House Bill No. 545 and Senate Bill No. 1475.

<i>Criteria</i>
<p>demonstrating reasonable openness and transparency about the LMP negotiations through briefings and consultation sessions. For LMP implementation, openness about water quality information, lake trends, research, and the success of management actions will be critical to creating support. At the same time, the structure for LMP negotiations must include forums that promote nuanced discussion of complex and sensitive issues among decision makers.</p>
<p><i>Appropriate Representation and Inclusion:</i> The structure of representation should promote effective negotiations toward an LMP and support the goal of building broad ownership of that LMP. Prospects for a successful result will be improved by the jurisdictional stakeholders directly and appropriately engaging other local stakeholders whose significant interests are likely to be affected by proposed solutions in order to demonstrate respect for jurisdiction and reduce suspicion, hostility, and opposition. Proactive attitudes and strategies that promote meaningful inclusion will generate more benefits than reactive ones. Similarly, a strategy for engaging the State of Washington that is proactive, respectful of jurisdiction, and inclusive offers greater potential for success. Absolute equality of representation for all stakeholders, while perhaps useful in other forums, is not a principle that will promote effective LMP negotiations.</p>
<p><i>Funding:</i> The challenge is to balance the need for a reliable and adequate funding stream with pragmatism and honesty about what is possible. Funding is at the core of past disagreements, and funding prospects likely will be tested early in negotiations. Negotiators will need reasonable grounds to believe that devoting resources to reaching agreement on a revised LMP will yield funding adequate to implement that agreement. Funding must be addressed on its own, and not be addressed indirectly through disagreements over technical issues such as the criteria for a monitoring program.</p>
<p><i>Sustained Political Commitment and Leadership:</i> Reaching agreement on a revised LMP will involve difficult policy choices with political implications. A sustained commitment to reaching agreement by state, tribal and federal elected officials will be important; the absence of such a commitment will become apparent when difficult policy decisions are required and likely will have negative consequences.</p>
<p><i>Effective State and Federal Agency Engagement:</i> This project was described as a high priority for the State and the United States during the assessment interviews. Having senior decision makers at the table at key points is strongly recommended to address issues that cut across existing organizational structures. Clearly authorized and empowered representatives are also recommended to provide continuity and maintain momentum. Multiple state agencies have legal authorities and jurisdiction that is relevant to a revised LMP. The situation at the federal level is similar in some respects. While all these agencies likely will not sit at the negotiating table, it is essential that they be effectively engaged throughout the process.</p>
<p><i>Negotiation at the Table:</i> Explicit commitments to pursue joint agreements "at the table," among the negotiators, rather than elsewhere and with other parties, will be helpful in overcoming distrust related to the 2002 ROD process and outcome as well as other factors.</p>

<i>Criteria</i>
<p><i>Respectful Treatment of Schedules, Deadlines, Decision Making, and Commitments:</i> Scheduling, including respect for deadlines, commitments, and meeting dates, must be managed to limit or avoid conflict. This includes making realistic commitments, honoring them, and limiting the need to ask for changes, particularly at the last minute. The Tribe and State have different decision making processes that will influence LMP negotiations. Openness among the negotiating parties about these differences, including decision making and timeframes, and joint planning based on accurate information, will be an asset.</p>
<p><i>Respect for Sovereignty and Jurisdictional Authorities:</i> This criterion reflects the interests described in the previous section of the report. It includes distinctions between lake and terrestrial jurisdiction, and an acknowledgment of the need for direct discussions where jurisdictions meet, intersect or require cooperation for effective LMP implementation.</p>
<p><i>Flexibility and Adaptability:</i> The complex interests and dynamics related to negotiating and implementing a revised LMP argue for significant flexibility and adaptability as characteristics of any negotiation structure, along with adherence to core principles. A rigid approach, while more predictable over the short term, may undermine efforts to find agreement in a changing environment.</p>

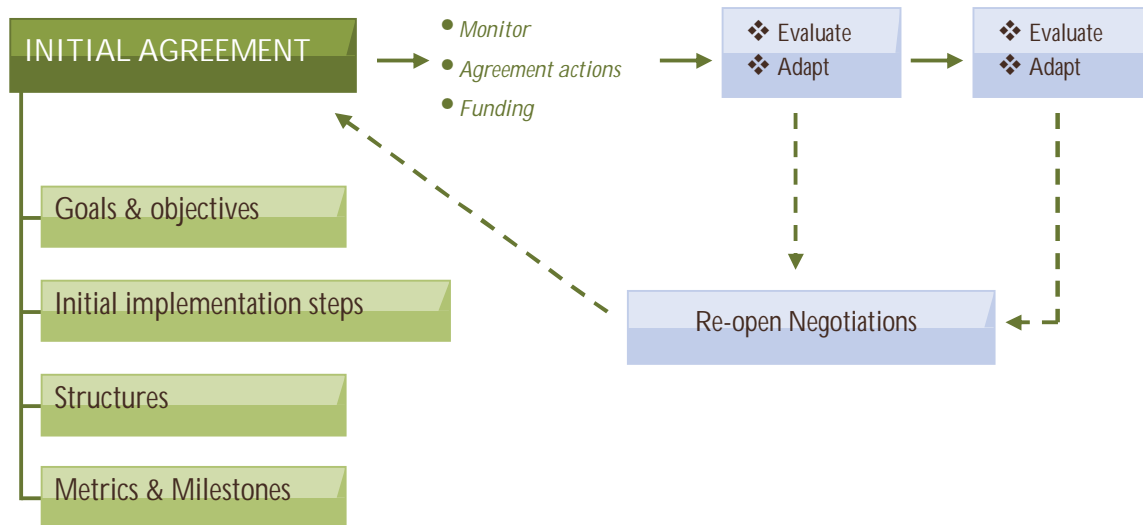
VI. Recommended Framework for LMP Negotiations and Decision Making

This section presents a recommended framework for LMP negotiations and subsequent decision making. It is generally consistent with the framework presented at the June 26th report-back session. Four significant components of the framework are described in this section: (1) an adaptive approach, (2) a scope that is narrow but has the potential to expand, (3) an emphasis on maximizing the benefits of voluntary action under existing regulations, and (4) a marketed approach to LMP development. The recommended representation structure is presented in Section VII.

An Adaptive Approach to Lake Management

Figure VI-1 depicts an adaptive approach to lake management. This approach assumes an initial agreement developed by negotiators consistent with recommendations in Section VII of this report. The initial set of issues would include goals and objectives, structures for decision making, and metrics and milestones. These issues are discussed later in this section. As seen in Figure VI-1, implementation involves specific actions, monitoring, and funding, evaluation and adaptation, and then another phase of management actions, monitoring, and funding. Under this approach the full suite of issues potentially related to long-term lake management would not be addressed at one time. Instead, negotiators would address an initial set of issues in the first phase, and address additional issues in subsequent phases. Initial solutions would be evaluated and adapted as necessary. The basic agreement could be re-negotiated based on future events.

Figure VI-1: Adaptive Model For LMP Negotiation and Decision Making



Initial Negotiation Issues

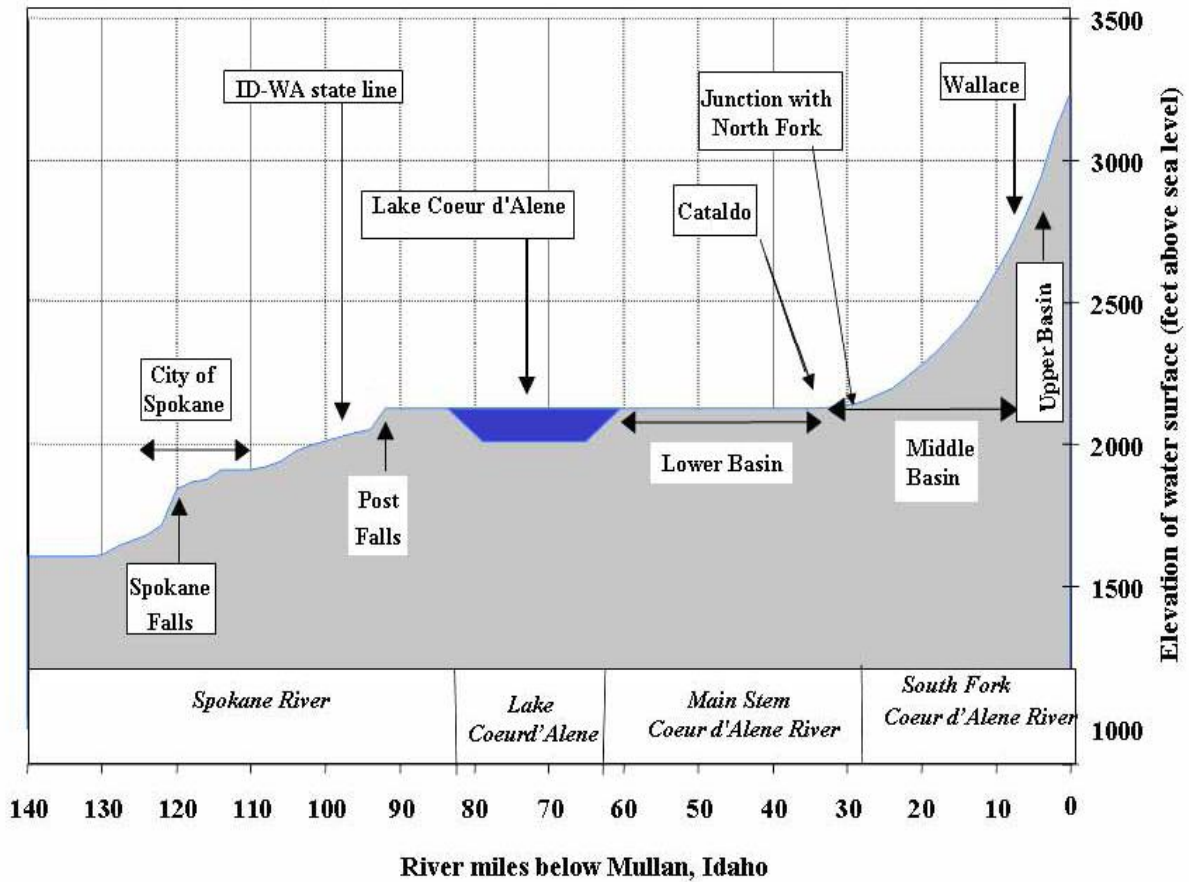
Consistent with this approach, there are six issues that negotiators should address in an initial agreement. These are:

- Revised LMP scope
- Goals and objectives for lake management
- Information needs
- Funding
- Structures
- Metrics and milestones
- Public education and engagement

What is the right scope for a revised LMP?

The scope of a revised LMP is a sensitive question and is directly related to a definition of lake management. A broad scope may appear crucial to achieve an integrated, Basin-wide set of solutions, but it may also be unrealistic to take on the full suite of challenges, at least initially.²⁶ One way to approach this question is to follow the flow of water, into and out of Lake Coeur d'Alene, as shown in the following diagram from the NRC Report.

²⁶ This report recommends against a scope that would include issues linked to regulation of encroachments such as docks or floating structures. The report also recommends against including issues linked to the *Trail of the Coeur d'Alenes* on the former Union Pacific right of way, largely because of the apparently intractable nature of the ongoing dispute. This recommendation does not reflect a judgment about the concerns of the people and governments involved.



It is clear that many upstream human activities, in the Upper, Middle, and Lower Basin, can affect the Lake, and that the Lake has the potential to influence human activities downstream. This watershed frame is useful for understanding connections and the universe of potential stakeholder interests. It also defines a future boundary for solutions that may be identified during implementation. But a watershed frame likely is too broad for initial negotiations because of the lack of consensus about lake conditions and solutions at this time. Similarly, a scope that essentially follows the CERCLA cleanup boundary, or is limited to the OU3 area boundary, is likely too broad for the initial phase of negotiations and implementation.

This report recommends a scope that initially is narrow (Phase I), with the potential for broadening as agreements are reached, progress is evaluated, and a clearer picture of lake trends and influences is developed (Phase II). The immediate focus would be on lake conditions, and the immediate goal would be to create a shared scientific understanding of key mechanisms for release, transport, and fate of specific contaminants. The core activities to accomplish this goal would be sampling, monitoring, research, and public education. Costs in this initial phase are intended to be manageable. They are directed at obtaining data needed for future decision making and public education. In this phase there would be limited effort devoted to reducing nutrient loading. There also would be a complete management audit (already underway) of past actions and results. As

Phase I goals are achieved and there is a clearer picture of potential funding, the LMP scope could expand to include management actions around the Basin in Phase II. Decisions would be based on lake conditions and potentially supported by modeling. As in Phase I, it would be critical to appropriately engage all stakeholders whose significant interests would be affected by proposed actions.

What are initial goals and objectives?

Goals and objectives for lake management will be critical to success. They likely will be both quantitative, such as specific *chlorophyll a* concentrations, and qualitative, such as “drinkable, fishable, and swimmable.” Here is an example of a possible goal from the NRC Report:

The geochemistry of the lake bottom is of concern because the processes occurring there determine the extent to which the metals in the contaminated sediments will be come biologically available and thus a risk to the fish and benthic populations. If the metals remain in the insoluble form, these risks are reduced. Maintaining a lake environment that will keep these metals insoluble is a primary goal of a lake management plan.²⁷

Other suggested goals and objectives for Phase I (apart from water quality) include effective decision making, reliable funding, and building understanding and support among stakeholders and the broader public.

What are initial information needs?

The negotiators will be in the best position to answer this question. Four obvious candidates are sampling, monitoring, research, and modeling. Modeling might include scenarios for future management actions, and also geochemical mechanisms for release, uptake, and fate. The ongoing management audit also will yield information relevant to this question.

What are initial funding priorities?

Funding can be viewed in many ways, but for purposes of this discussion there are short-term and long-term priorities. Short-term priorities (Phase I) likely include sampling, monitoring, and some research. They also likely include public education and engagement, and LMP operations. Long-term priorities (Phase II) likely include research, modeling to support decision making, and potential management actions.

What initial structures are needed?

A successful LMP will have a series of negotiated and integrated structures to support diverse requirements. These will address decision making, management and operations, stakeholder input, broader public education and engagement, and funding.

What are initial metrics and milestones?

²⁷ NRC Report p. 90.

The purpose of metrics and milestones is to allow evaluation of progress toward goals, adaptation of strategies, and potential review of basic approaches. One obvious set of metrics might relate to lake conditions. Another might involve progress measures linked to management actions and modeling. A third set of metrics might be developed for funding, particularly for a long-term strategy.

Maximizing Voluntary Opportunities

The success of an LMP negotiation ultimately will be measured by the extent to which its negotiated goals can be implemented. Based on interviews, an implementation strategy that immediately pursues additional regulatory authority without fully testing opportunities for voluntary joint action and ownership is likely to meet significant resistance. *This report recommends an adaptive implementation strategy that begins with a commitment to (1) maximizing the potential contributions from existing regulatory authorities, and (2) building broad support for lake management that will result in effective voluntary compliance.* This initial strategy would not simply be a “command and control” regime due to a number of factors that include limits on regulatory authority, the importance of actions higher up in the Basin, multiple agency jurisdictions, and the need for voluntary compliance through broad ownership of a revised LMP. This strategy would explicitly build on the findings of the joint “audit” of the 1996 LMP management actions currently underway. If primary goals and objectives for lake management, i.e., protecting water quality and instituting a robust sampling, monitoring, and reporting program, can be achieved by combining existing authorities with extensive efforts to build ownership, the voluntary strategy would be maintained. If, however, lake management goals and objectives cannot be achieved, and water quality in the Lake deteriorates, LMP implementation will require a new regulatory approach. This could involve the Tribe and State pursuing enhanced regulatory authority at the state and federal levels to protect the Lake and associated interests. The EPA also would likely face difficult choices in light of mandates and authorities related to lake conditions.

Marketing a Draft LMP

One approach to negotiations is to set a goal of achieving complete agreement on all aspects, including funding levels, during a single negotiation effort of four to eight months. This option might include some broad public involvement in addition to the inclusion of stakeholders through dialog, direct reporting, and consultation. At the conclusion of negotiations, the parties would have a “final” agreement and would begin implementation, including steps related to funding.

A second approach would be to aim for agreement on a draft LMP document (or even a framework) within three to six months, and then undertake a joint “marketing” campaign over the following three to six months to build political and public support for the draft agreement that translates into clarity about funding. Based on results of the marketing phase, the negotiators would finalize the revised LMP and move to implementation. This approach also would include dialog, direct reporting, and consultation with other stakeholders and broader public involvement.

The choices outlined above for establishing a negotiation structure require further discussion by the parties as part of their initial three- to six-month effort to negotiate a revised LMP. *Based on information gathered during the assessment, this report recommends an approach that is based on maximizing voluntary opportunities and marketing a draft LMP.*

VII. Recommended Structure for Representation in LMP Negotiations

Three models for structuring representation in an LMP negotiation are presented in this section. All three reflect different weighting of the criteria for success identified above in Section V:

- A. Jurisdictional Stakeholders with Direct Dialog and Reporting to Other Stakeholders
- B. Jurisdictional Stakeholders with Other Stakeholders as Observers
- C. Jurisdictional Stakeholders and Other Stakeholders

Model A assumes the negotiations will primarily be among the three sovereigns having jurisdiction over the Lake's bed and banks: the State of Idaho, the Tribe, and the United States (as trustee). The criteria identified in Section V are balanced to support efficiency, effective communication, and inclusion. Models B and C reflect different balancing of criteria, with greater weighting for equality of representation and inclusion, and a corresponding loss of efficiency and effective communication. These two models are similar in some respects to the BEIPC and the 2004 LMP negotiations.

Discussion of each model is followed by a comparison and recommendation. Each model includes a set of Negotiation Principles found in Attachment B to this report. This report assumes that each stakeholder would commit to negotiating consistent with these principles. Each model also assumes broad public involvement to build understanding and ownership.

Model A: Jurisdictional Stakeholders with Direct Dialog and Reporting to Other Stakeholders

- Tribe and IDEQ (as lead agency for State) are primary negotiators
- Joint development and review of agenda topics, key issues, status of decision making, points for seeking input
- EPA actively engaged through both CERCLA and Water Quality programs
- Senior management is "hands on," at the table as needed and available for direct discussion and decision making
 - Recommendation for State lead is Gwen Fransen with direct reporting to IDEQ Director Toni Hardesty
 - Recommendation for U.S. EPA lead is Don Martin with direct reporting to Deputy Administrator Kreizenbeck²⁸
 - Recommendation for Tribal lead is Phil Cernera with direct reporting consistent with Tribal governance and decision making
- Structured "education and dialog" sessions as part of specified negotiation sessions to ensure direct engagement and focus on interests of other stakeholders
- IDEQ establishes transparent and consistent internal State consultation structure to ensure cross-agency discussions and advice. Mediator is actively engaged in this effort to maximize its effectiveness and identify any challenges as early as possible in collaboration with the State and, if appropriate, other sovereigns. EPA Region

²⁸ This recommendation is subject to modification based on further input from EPA about the appropriate role for the Regional Administrator.

- 10 establishes similar structure with federal agencies and with EPA HQ, with Tribal role as appropriate
- IDEQ establishes regular report-back/input channel with local government on revised LMP issues
 - Option of joint mediator report back with IDEQ
 - Option of joint Tribe-IDEQ report back
- IDEQ and Tribe jointly create feedback process with business community through Chamber of Commerce, and with other local stakeholders, with EPA participating as appropriate to promote coordination
- *Note:* Report back could be made more structured to address interests in transparency and engagement
 - Report back following each scheduled negotiation session among jurisdictional stakeholders
 - Other governments are invited: State of Washington, county representatives
 - Business community invited through Chamber of Commerce
 - Congressional delegation invited
 - Specific date and time are set in conjunction with each negotiation session in advance to allow for scheduling
 - Mediator present for all sessions
- Three jurisdictional stakeholders provide regular updates to BEIPC
- Commitment to Negotiation Principles

Model B: Jurisdictional Stakeholders with Other Stakeholder Observers

- Tribe and IDEQ are primary negotiators with EPA actively engaged
- WA State has observer status
- Other ID state agencies have observer status
- ID Congressional delegation has observer status: one representative (pooled)
- Shoshone, Benewah, and Kootenai Counties have observer status
 - Ideal is a single observer reporting to all counties
 - Less desirable is each county having a representative due to potential importance of technical knowledge and number of people in room
 - Funding a single position could be valuable to demonstrate support for interests of representation, ownership, and inclusion
- Requires IDEQ and Tribal report-back and consultation with other stakeholders similar to Model A
- Commitment to Negotiation Principles

Model C: Jurisdictional and Other Stakeholders

- This option does not distinguish between jurisdictional and other stakeholders
- All stakeholders, governmental and non-governmental, participate in negotiation sessions
- Potential representation for: Counties, Chamber of Commerce, Extractive Industries, Organized Homeowners, Conservation Groups, State of Washington
- Congressional delegation observes via pooled representation
- Other ID state agencies and U.S. agencies observe
- Commitment to Negotiation Principles

These three models present different approaches to balancing the criteria for success in Section V. Any of them could be customized so long as the basic balance is maintained.

Evaluation: Representation Structures

<i>Model</i>	<i>Strengths</i>	<i>Questions</i>	<i>Rank</i>
A	<ul style="list-style-type: none"> • Efficient structure • Encourages open communication on difficult issues among IDEQ, Tribe, EPA as jurisdictional stakeholders • Satisfies need for high-level involvement • Dialogs ensure attention to other stakeholder interests such as control through direct participation • IDEQ-Tribe report back to other stakeholders (in addition to dialog) promotes inclusiveness and transparency • EPA consults outside negotiations consistent with responsibilities • Structured report-back option can build confidence • Enhanced mediator role promotes consideration of other stakeholder interests 	<ul style="list-style-type: none"> • Likely to test State-Local government relationships • Unstructured report-back option may not fully address interests of other stakeholders • Scheduled report-back option creates additional demands on jurisdictional stakeholders, adds complexity to logistics • Structures local government role differently from other recent forums and agreements that may have created expectations 	1
B	<ul style="list-style-type: none"> • Greater inclusiveness for other stakeholders including local governments • Ensures rapid input if key stakeholder interests are misstated or omitted • Fewer stakeholders for report-back sessions • Improves Congressional understanding of negotiations • Reduces/eliminates mediator involvement in report back 	<ul style="list-style-type: none"> • Likely constraint on open discussion of sensitive issues among jurisdictional stakeholders • Less efficient with potential requests by observers to address negotiators, more logistical issues • Possible issues over adding observers • Media coverage more likely • Logistics more complex • Requires technically competent observers and continuity of participation 	2

<i>Model</i>	<i>Strengths</i>	<i>Questions</i>	<i>Rank</i>
C	<ul style="list-style-type: none"> • Maximizes representation and inclusion of other stakeholders and their views • Ensures regular opportunities for all stakeholders to articulate interests and influence outcomes 	<ul style="list-style-type: none"> • Likely to impair open discussion of sensitive issues, including possible options • Likely to be least efficient forum • Media coverage likely • Increases complexity of logistics including scheduling • Increases potential for direct conflict based on history • Requires technical sophistication • Likely increased costs to pay for non-government representatives • More difficult to maintain focus on Phase I scope issues 	3

Recommendation: This report recommends a representation structure consistent with the balance of criteria in Model A. The negotiations should primarily be among the three jurisdictional parties: the Coeur d’Alene Tribe, the State of Idaho, and EPA. These negotiators should directly engage other stakeholders on specific issues likely to affect their interests, i.e., dialog. This will include one or more local governments if negotiations address that government’s jurisdiction over potential land use controls directed at nutrient management, or if they address public education. Dialog may include environmental advocacy organizations, again depending on specific issues. This approach anticipates direct engagement with the State of Washington, also on an issue-specific basis. Consistent and timely reporting back and consultation by the jurisdictional sovereigns with other stakeholders, including the local business community, is an additional and essential component of this approach to address interests in both transparency and inclusion. A third component is internal consultation with other governmental agencies, such as the U.S. Fish and Wildlife Service and the Idaho Department of Lands. A fourth component is a public education and input program once the details of a potential revised LMP become clearer. A fifth component is appropriate coordination with the BEIPC.

This recommended approach balances representation and inclusiveness with effective communication, efficiency, and reasonable transparency. It does not elevate equality over other criteria that are critical to maximizing the potential for a successful LMP negotiation. It is respectful of sovereignty and jurisdiction and reflects clear jurisdictional distinctions among state, federal, tribal, and local government. It is a departure from the structure of the BEIPC, designed to achieve a different but complementary set of goals. All stakeholders with significant interests that must be addressed in a revised LMP should be represented and included in this balanced and flexible approach, but the form of that representation and inclusion should be flexible to support the desired outcome.

VIII. Other Negotiation Choices

1. Getting to a Single Text

Given the goal of a written LMP, the recommended approach is a single-text negotiation. The key question is the extent of agreement on basic content and core issues. If there is high agreement it is reasonable to move into a single-text process sooner based on a Mediator Draft. If there is low agreement, the recommended approach is to develop basic agreements through an Agreement in Principle (AIP), then move to a single text.

AIP Approach:

- AIP may be signed as a way to reinforce commitments
- Agreements reached while developing the AIP are tentative and subject to approval of completed AIP
- Tentative Milepost: Complete AIP by April 2007

Mediator Draft Approach:

- Mediator confirms there is sufficient basic agreement to move forward
- Mediator takes Tribe's February 2006 draft and develops a single-text starting point through consultations with Tribe, State, and EPA

Assessment interviews suggest there may be sufficient agreement to pursue the Mediator Draft option, but this will be a decision for the negotiation parties in conjunction with the Mediator. Interest in making measurable progress by the end of three negotiating sessions is a significant factor influencing this choice.

2. Negotiation Timeline

This report proposes that the jurisdictional stakeholders adopt a preliminary timeline that would result in an initial draft LMP by September 2007. A number of drivers could affect this timeline.

- Information drivers:
 - 2004-06 water quality data
 - 1996 LMP action plans audit results: possibly by December 2006
 - *These products will have a direct bearing on LMP negotiations and must be incorporated into the negotiation schedule*
- Decision-making drivers:
 - Decision makers engaged at table with effective, empowered representatives: speeds process
 - Decision makers not engaged and representatives lack authority: slows process

3. Meeting Format and Schedule

- Take account of criteria for success and time factors
- Combine 1- and 2-day meetings
- Possible schedule for first three negotiation sessions
 - Kickoff session:
 - 1 day
 - Formalities, negotiate approach (AIP or Mediator Draft), identify issues and priorities, identify data needs and options
 - Key decision makers for formalities, approach, issues
 - Report back
 - 2-3 week break
 - If AIP: Mediator develops draft framework and circulates
 - If Mediator Draft: Mediator develops draft single text based on discussions with parties and circulates prior to next session
 - Possible conference call
 - 2nd session:
 - 1 day
 - Refine issues and priorities
 - Develop plan for data
 - Seek early agreements
 - Key decision makers for early agreements (1 day)
 - Report back
 - 2-3 week break
 - 3rd session:
 - 2 days
 - Seek more agreements in principle
 - Evaluate progress and make joint decision on further sessions
 - Key decision makers for additional agreements, evaluation and decisions on next steps (1 day)
 - Report back
- Schedule at least three months forward
- Build report-back into meeting schedules as appropriate
- Have key decision makers attend report back where possible

4. Decision Principles

The State and Tribe will need to agree on all significant issues related to an LMP, and this agreement likely will be reflected through formal endorsement and signature. The role of EPA in relation to an LMP agreement will require further discussion and clarification early in negotiations. The negotiations also will benefit from agreement on negotiation and decision principles. Negotiation principles are discussed in Attachment B; this section proposes four additional decision principles. One principle for consideration is for EPA to be as clear as possible about its own needs and interests to promote sustainable solutions. A second principle is for all three of the jurisdictional stakeholders to seek as high a level of consensus as possible among them. In other words, the goal should be agreements that include EPA, even if that agency ultimately is not a signatory to the LMP. A third principle for consideration is clarifying the reasons why consensus is not achieved on an issue, as a way of illuminating needs and interests and possible future solutions. A fourth principle is seeking consensus with other stakeholders that are engaged on specific issues. This report recommends going beyond merely listening by actively seeking solutions that are mutually acceptable to all interested stakeholders, consistent with legal requirements and other basic criteria.

IX. Next Steps

Decision on revised LMP negotiation. The State, Tribe, and EPA face a decision on whether to proceed with revised LMP negotiations, and under what conditions if any. HCCM proposes a conversation involving the Institute, State, Tribe, and EPA during the week of January 8th to discuss the process for seeking agreement on next steps. This could occur sooner if schedules permit.

Attachment A: Assessment Participants

The following people participated in the LMP assessment process in a variety of ways including confidential in-person or telephone interviews, advice about issues, interviews and participants, and documentation:

State of Idaho

Director Toni Hardesty, Department of Environmental Quality
Gwen Fransen, DEQ
Glen Rothrock, DEQ
Ed Tulloch, DEQ
Curt A. Fransen, Attorney General's Office
Craig Foss, Department of Lands

Coeur d'Alene Tribe

Chairman Chief J. Allan
Phil Cernera
Michael A. Beckwith
Robert Matte
Chuck Matheson
Quanah Spencer
Brian Cleary, outside legal counsel

U.S. EPA Region X

Deputy Regional Administrator Ron Kreizenbeck
Don Martin
Mike Gearheard
Dan Opalski
Anne Dailey
Angela Chung
Ted Yackulic

Benewah County

Commissioner Jack Buell

Kootenai County

Commissioner Rick Currie
Clyde "Rusty" Sheppard

Shoshone County

Commissioner Sherry Krulitz
Bill Rust
Kathy Zanetti

State of Washington

David George
John Roland

U.S. Senate

Office of Senator Larry Craig
Office of Senator Mike Crapo

U.S. House of Representatives

Office of former Representative C.L. "Butch" Otter

Idaho Legislature

State Senator Shawn Keough
State Representative Dick Harwood

BEIPC

Executive Director Terry Harwood

Kootenai Environmental Alliance

Executive Director Barry Rosenberg

Coeur d'Alene Chamber of Commerce

President Jonathan Coe
Carrie Oja
Dean Haagenson

Additional citizens, organizations, and agencies

Jim Aucutt, Spokane River Association
John Barlow, Hadagone Corporation
Bret Bowers
Givens, Funke & Work, legal counsel to Spokane Tribe
Greg Delevan, Lakeshore Homeowners Association
Rogers and Toni Hardy
John Osborne, Sierra Club
John Snider, CCC
John C. Tracy, Idaho Water Resources Research Institute
Paul Woods, formerly with the U.S. Geological Survey

Attachment B: Negotiation Principles

DRAFT Principles for Revised LMP Negotiations

Note: This draft assumes a representation structure consistent with Model A as recommended by this report. The principles can be modified to reflect a different approach.

The purpose of this document is to accurately describe mutual understandings among the Tribe, IDEQ, and EPA (the "Negotiation Parties") about (1) their commitment to enter into negotiations intended to result in agreement on a revised Lake Management Plan for Coeur d'Alene Lake (hereinafter "LMP Negotiations"), and (2) the structure, process, goals, milestones, and negotiating authority related to LMP Negotiations. This Convening Agreement does not address the content of a future Lake Management Plan.

The Parties commit to LMP negotiations consistent with the following:

1. **Negotiation Parties.** The LMP Negotiations will be among duly authorized representatives of the Tribe, IDEQ, and EPA (the "Negotiation Parties"). Representatives of Other Interested Parties will be invited to join the Negotiation Parties in order to discuss specific issues and potential solutions on a schedule to be mutually agreed on by the Negotiation Parties.
2. **Principals and Negotiation Leads.** Each of the Negotiation Parties has identified a Principal for the LMP Negotiations: Lake Management Director (Tribe), Director (IDEQ), and Deputy Regional Director (EPA). The Principals are fully authorized to represent their governments in connection with negotiation of a revised LMP. Each Principal has identified a Lead Negotiator who is authorized to represent the Principal in all matters related to negotiation of a revised LMP. The designated Lead Negotiators are: Mike Beckwith (Tribe), Gwen Fransen (State), and Don Martin (EPA). Each LMP negotiation session may involve the Principals or Leads, depending on specific agenda items and goals, as well as availability. Each Lead will advise the Mediator and other Leads in advance of each negotiation session whether their Principal will attend, to the extent possible.
3. **Negotiating Authority.** By its endorsement of this Agreement, and consistent with Paragraph 2 above, each Negotiation Party represents that its Principal and Negotiation Lead are fully authorized to represent that Negotiation Party in LMP Negotiations, and will have necessary authority to participate effectively, including authority to make decisions and enter into agreements in a timely manner that promote progress toward agreement. Each Negotiation Party acknowledges that consistent representation will be important for constructive negotiations; however, each Negotiation Party retains the authority to change its Principal, Lead, and negotiating team as necessary.
4. **Meeting with Other Interested Parties.** The Negotiation Parties acknowledge that other governments, organizations, and individuals, as well as the broader public, are interested in the substance of a revised LMP. The Parties are committed to fully understanding all interests potentially affected by a revised LMP and structuring solutions to address diverse interests that

are consistent with their own. Consistent with Paragraph 1 above, Other Interested Parties will be invited to meet directly with the Negotiation Parties, on an issue-by-issue basis, as issues arise that may directly affect their interests and potential roles in overall management of the Coeur d'Alene Basin. The Negotiation Parties must agree in advance on each invitation, and on the subject matter proposed for discussion.

5. **Issues and Focus for Negotiation.** The issues for an LMP negotiation are well known to the Negotiation Parties and the specific topics for negotiation will be mutually agreed upon and reflected in agendas for each session. Issues not directly related to a revised LMP are not appropriate for this negotiation, and should not be linked, either directly or indirectly, to any aspect of a LMP. The Negotiation Parties agree to address non-LMP issues in other forums.
6. **Single Text and Use of Current Revised LMP Drafts or Other Versions.** The Negotiation Parties will work with one another and the Mediator to achieve sufficient agreement on key issues to adopt a single text for negotiations. There are a number of existing documents, in final or draft form, which will inform the LMP negotiations and ultimately a single text LMP negotiating document. Each existing document will be considered on its merits, and the Negotiation Parties will reach decisions jointly on its potential contribution to an LMP negotiating document. There shall be no conditions attached by a Negotiation Party to the use of any existing document or its contents, in whole or in part. This paragraph is not intended to prevent the Negotiation Parties from mutually agreeing to use portions of an existing document.
7. **Meeting Agendas, Schedules, and Logistics.** The Mediator shall have primary responsibility for preparing meeting agendas, in consultation with the Negotiation Parties. The Mediator will work jointly with the Negotiation Parties to establish mutually acceptable meeting schedules, locations, and other logistics.
8. **Progress and Milestones.** The Negotiation Parties acknowledge the importance of demonstrating progress in their negotiations within a reasonable and realistic timeframe. While it is not practical to assign specific dates to negotiating results at this time, the Negotiation Parties expect to achieve measurable, substantial progress toward a revised LMP after completing three negotiation sessions. The Principals and Negotiation Leads will confer following the third session to evaluate progress and shall make a joint decision about continuing with negotiations, including whether to modify the negotiation process or this agreement. A similar joint evaluation will occur on the same schedule thereafter, or on a modified schedule if agreed by the Principals and Negotiation Leads. In the event the Negotiation Parties are unable to agree on progress, the negotiations shall be suspended until such time as they are able to agree, or one or more Negotiation Parties provides notice that it is withdrawing from the LMP Negotiations.
9. **Reporting to Internal and External Constituents.** Each Negotiation Party shall be responsible for clearly and consistently communicating to internal and external constituents about the LMP negotiations. Internal constituents may include other divisions within a

government agency as well as sister agencies and elected and appointed government officials. External constituents include local government, non-governmental organizations and individuals as well as elected and appointed officials from other states or tribes. The content of such communications shall be left to each Negotiation Party, and shall be consistent with Paragraph [11] of this agreement.

10. Confidentiality and Public and Media Interest. The Negotiation Parties understand the potential for significant interest in the LMP Negotiations from internal and external constituencies, the general public, and the media. Each Negotiation Party faces complex judgments about balancing confidentiality (in order to promote constructive negotiations) against appropriate disclosure intended to promote education, understanding, and support. The Negotiation Parties will address the question of communicating with constituents, the general public, and media flexibly, as part of the agenda for each LMP negotiation session. Effective with this agreement, and so long as LMP negotiations are underway, each Negotiation Party is authorized to carry out its obligations as it deems appropriate, consistent with agreements reached at negotiation sessions and a basic principle of supporting LMP negotiations. This principle includes, but is not limited to, avoiding attribution of specific statements or motives to another Negotiation Party in any communication with the media, general public, or external constituent.
11. Dispute Resolution. The Negotiation Parties understand that, even working with a Mediator, they may face issues that are difficult to resolve. In the event Negotiation Leads are unable to resolve an issue they shall notify their respective Principals, and the Principals shall arrange to meet promptly with the Mediator to find a mutually acceptable resolution, usually within 30 days of notification. In the event the Principals are unable to reach a resolution, they shall consult as appropriate with ultimate decision makers and report back to the Mediator within 30 days with a proposed resolution. The Mediator shall work with the Principals and Negotiation Leads to seek a resolution following such consultations, or reach a mutual decision to end LMP negotiations.
12. Good Faith Commitment. The Parties agree to negotiate in good faith, consistent with this agreement, to achieve their mutual goal of a revised LMP. This commitment includes, but is not limited to, civility, honesty, and respect in communications, seeking solutions that address the interests of other Negotiation Parties, and consistently supporting the mutual goal of an LMP agreement.